[1980–87 Gib LR 496]

ALDINGTON SHIPPING LIMITED v. BRADSTOCK SHIPPING CORPORATION and MABANAFT GmbH ("THE WAYLINK" and "THE BRADY MARIA")

COURT OF APPEAL (Spry, P., Fieldsend and Law, JJ.A.): May 28th, 1987

Conflict of Laws—forum conveniens—stay of Gibraltar proceedings—party seeking stay of Gibraltar proceedings to establish that alternative forum more appropriate than Gibraltar

Conflict of Laws—forum conveniens—juridical advantage—party's juridical advantage in hearing case in Gibraltar relevant if injustice caused by depriving him of it, e.g. different burden of proof in foreign jurisdiction may be disadvantage—clear evidence required to show that procedures in modern foreign jurisdictions may cause injustice merely because differ from English procedure

The respondent/plaintiffs commenced proceedings for damages for negligence against the defendant in the Supreme Court.

Two vessels, the *Waylink* and the *Brady Maria* collided on a German river. The *Brady Maria* was registered in Panama but managed by an English company; it was carrying a cargo of oil owned by the second respondent/plaintiff, a German company. The *Waylink* was registered in Gibraltar and managed by an Italian company in Monte Carlo. Both vessels had Yugoslavian crews and both, at the time of the collision were under the navigation of German pilots. The collision caused damage to both vessels and oil pollution to the river.

The appellant/defendant owner of the *Waylink* commenced proceedings for damages for negligence against the plaintiff owners of the *Brady Maria* in Germany and subsequently applied in proceedings, also in Germany, to limit its own liability. Later the same month, the respondent/plaintiffs brought proceedings for damages in negligence against the appellant/defendant in Gibraltar, who in turn sought a stay of those proceedings. After listing the factors favouring litigation in Germany—the collision occurring in German territorial waters, the innumerable German witnesses, the survey of both vessels in Germany and the repairing of the respondent/plaintiffs' vessel there—the Supreme Court (Davis, C.J.) concluded that the evidence showed no more than a mere balance of convenience in favour of the continuance of proceedings in Germany (which was not a sufficient justification to stay the proceedings in

Gibraltar). Moreover, it held that a stay of the Gibraltar proceedings would deprive the respondent/plaintiffs of a legitimate juridical advantage which would be available to them in Gibraltar—namely that in Germany, they would not have the same broad right to discovery of documents as they had here and that the burden of proof here would lie on the appellant/defendant but would be reversed in Germany. The court concluded that these juridical disadvantages were not outbalanced by the factors showing that Germany was the natural and appropriate forum for the adjudication of proceedings between the parties, and refused to stay the Gibraltar proceedings.

On appeal, the appellant/defendant submitted that the Supreme Court had approached the issue in an incorrect manner. It should have (a) determined first the natural forum of the dispute by ascertaining with which forum it had the most real and substantial connection—where the cause of action arose, what was the availability and convenience of the parties and witnesses and generally where justice might best be done; and (b) if the natural forum was found to be Germany, the court should have granted a stay of the Gibraltar proceedings unless the plaintiffs could cogently show that they would be deprived of some juridical advantage by having to conduct proceedings in Germany—and the matters relied on as being juridical disadvantages should not, on the authorities, have been relied on, and the stay therefore granted.

The respondent/plaintiffs submitted that (a) the judge had approached the matter correctly—it could be inferred from his reasoning that he had considered whether Germany was the natural and appropriate forum and found that it was not; and (b) they would be deprived of juridical advantages by having to litigate in Germany, as (i) in Germany the burden of proof would be upon them to establish that the collision occurred as a result of the fault or privity of the defendant, and (ii) German law, in contrast to English law, did not have a discovery procedure compelling a party to disclose documents adverse to its case.

Held, allowing the appeal:

(1) A stay of the proceedings in Gibraltar would be granted. In refusing to grant the stay, the Supreme Court had approached the matter incorrectly. It should first have considered whether a German court was the natural and appropriate forum in which the dispute should be heard, the onus being on the defendant, as the party seeking the stay, to prove that this was a suitable alternative forum. In the event that the appellant defendant was able to discharge this burden, the court should then have gone on to consider whether the respondent plaintiffs would be deprived of a juridical advantage in having to argue their case in Germany. Here, it was clear that the German court was the natural forum as the action had the most real and substantial connection with Germany. The collision had taken place on a German river, when German pilots had been navigating, a limitation fund had been set up in Germany and there were German witnesses. In contrast, the only real connection with Gibraltar was the

registration of the ship and the official, but not actual, domicile of the respondent owners of the *Brady Maria* (*per* Fieldsend, J.A., at para. 35; para. 37; and paras. 48–49; *per* Law, J.A., at para. 51; Spry, P. dissenting, at para. 73).

(2) The respondent/plaintiffs would not be deprived of a juridical advantage by having to argue their case in Germany. There was no evidence to suggest that they would be caused substantial injustice either because the burden of proof would be upon them to establish that the collision occurred as a result of the fault or privity of the appellant defendant, or because they would be deprived of the advantages of Gibraltarian discovery procedures. The Supreme Court had erred in finding to the contrary. Clear evidence was required to show that the procedures adopted in other civilized and sophisticated jurisdictions would cause injustice because they differed from English procedure (*per* Fieldsend, J.A., at paras. 43–47; *per* Law, J.A., at paras. 52–54; Spry, P. dissenting, at para. 73).

Cases cited:

(1) *Abidin Daver*, *The*, [1984] A.C. 398; [1984] 2 W.L.R. 196; [1984] 1 All E.R. 470; [1984] 1 Lloyd's Rep. 339, considered.
(2) *Amin Rasheed Shipping Corp.* v. *Kuwait Ins. Co.* (*The Al Wahab*), [1984] A.C. 50; [1983] 3 W.L.R. 241; [1983] 2 All E.R. 884; [1983] 2 Lloyd's Rep. 365, considered.
(3) *Atlantic Star*, *The*, [1974] A.C. 436; [1973] 2 W.L.R. 795; [1973] 2 All E.R. 175, followed.
(4) *Coral Isis*, *The*, [1986] 1 Lloyd's Rep. 413, considered.
(5) *Muduroglu Ltd.* v. *T.C. Ziraat Bankasi*, [1986] Q.B. 1225; [1986] 3 W.L.R. 606; [1986] 3 All E.R. 682, considered.
(6) *Rockware Glass Ltd.* v. *Macshannon*, [1978] A.C. 795; [1978] 2 W.L.R. 362; [1978] 1 All E.R. 625, considered.
(7) *Spiliada Maritime Corp.* v. *Cansulex Ltd.* (*The Spiliada*), [1987] A.C. 460; [1986] 3 W.L.R. 972; [1986] 3 All E.R. 843; [1987] 1 Lloyd's Rep. 1, considered.
(8) *Trendtex Trading Corp.* v. *Credit Suisse*, [1982] A.C. 679; [1981] 3 W.L.R. 766; [1981] 3 All E.R. 520, considered.

R. Aikens, *Q.C.* and *T.G. Phillips* for the respondent/plaintiffs;
R.F. Stone, *Q.C.* and *E.C. Ellul* for the appellant/defendant.

1 **FIELDSEND, J.A.:** This is an appeal against the decision of Davis, C.J. refusing to stay proceedings in Gibraltar. It is brought by Bradstock Shipping Corp. and Mabanaft GmbH ("the plaintiffs") against Aldington Shipping Ltd. ("the defendant"), pending the determination of proceedings brought in West Germany by the defendant against the first plaintiff.

2 The proceedings in each case arise from a collision between the first plaintiff's ship, *Brady Maria* and the defendant's ship, *Waylink*, on the

River Elbe in West Germany on January 3rd, 1986. In the collision both vessels suffered damage and oil pollution occurred in the River Elbe for which the responsible party may well be liable to the International Oil Pollution Compensation Fund.

3 The first plaintiff is a company registered in Liberia and its vessel *Brady Maria* is registered in Panama, but managed by Shalehall Ltd., an English-registered company carrying on business in England. The vessel, a small motor tanker, was at the time carrying a cargo of oil owned by the second plaintiff, a company registered in West Germany.

4 The defendant is a company registered in Gibraltar and its vessel *Waylink* is registered in Gibraltar, though managed by an Italian company in Monte Carlo. The vessel is registered at Lloyd's as being managed by Sorek Services (Gibraltar) Ltd., a Gibraltar company with London agents, Sorek Chartering Ltd. This was said to be to preserve the anonymity, for tax purposes, of the beneficiaries of the defendant company who are Italian nationals.

5 The *Brady Maria* is worked by a Yugoslav crew, though its registered records are kept in English and it plies mainly between north European ports. The *Waylink* has a Yugoslav crew and normally plies between north African and north European ports. Following the collision, the *Brady Maria* remained in Hamburg, which was its destination on that voyage and where its survey, damage assessment and repair were effected. The *Waylink* was also surveyed in Hamburg but left the next day and was surveyed again in Cadiz.

6 From the information presently before us, it appears that the damage to the *Waylink* is in the region of US$92,000, and to the *Brady Maria* about US$400,000, plus the value of the lost cargo of oil which is about US$150,000. There are other substantial claims being made by the West German Government and the International Oil Pollution Compensation Fund arising from oil pollution caused by the collision. On January 14th, 1986, the plaintiffs issued a writ *in rem* against the *Waylink* in the Admiralty Court in London but this was not served on the defendant, and is irrelevant to these proceedings.

7 On January 17th, the defendant commenced proceedings against the first plaintiff and the master of the *Brady Maria* for damages in the Regional Court of Hamburg, serving the process on the master in Hamburg. On January 23rd, the defendant filed an application in the Hamburg District Court initiating proceedings for limiting liability which were started on January 29th, the date for the examination of claims being fixed for May 28th, 1986. The defendant's limitation fund was set at DM440,185. Claims filed against this fund by the plaintiffs, the West German Government and International Oil Pollution Compensation Fund,

however, greatly exceed the limitation fund. There may, therefore, be other litigation seeking full recompense for the damage sustained.

8 On January 30th, the plaintiffs commenced proceedings in Gibraltar against the defendant claiming damages. The defendant initiated its application for a stay of the Gibraltar action on February 20th, 1986. This was dismissed on March 19th, and written reasons given on May 30th. Leave to appeal was granted on June 24th. Since then, the plaintiffs on July 14th, 1986, have amended their writ and statement of claim to claim, in addition to damages, a declaration that the defendant is not entitled to limit its liability in respect of damages resulting from the collision.

9 In the court below, the learned judge set out the facts with clarity and brevity and detailed the 15 main points outlined in the affidavits filed for the defendant, which it relied upon in seeking the stay of proceedings. Of these points, he found the "most potent" to be that the collision occurred in German territorial waters and that there would be numerous German witnesses including pilots and perhaps V.H.F. operators. Of the other 13 points, the learned judge found that the fact that surveys of both ships were carried out in Germany and the fact that the *Brady Maria* was repaired in Germany weighed slightly in favour of a German forum, whereas all the others were neutral and favoured neither jurisdictional choice.

10 As against this, there were the facts that the *Waylink* was registered in Gibraltar and the defendant company was incorporated here. On this basis he concluded that while the defendant had adduced evidence to show that it would, in some respects, be more convenient and less expensive to have the proceedings relating to the collision determined in Germany where it occurred, it appeared to him that the evidence showed no more than a mere balance of convenience in favour of the continuance of the proceedings in Germany. The learned judge referred briefly to *The Atlantic Star* (3), *Rockware Glass Ltd.* v. *Macshannon* (6) and *The Abidin Daver* (1), and finally to *The Coral Isis* (4), which he considered accurately set out the applicable principles as follows ([1986] 1 Lloyd's Rep. at 416):

> "(1) A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English court if it is otherwise properly brought. The right of access to the Queen's Court must not lightly be refused.
>
> (2) In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the court that there is another forum to whose jurisdiction he is answerable in which justice can be done between the parties at substantially less inconvenience or expense, and (b) the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would

be available to him if he was invoked in the jurisdiction of the English court.

(3) The exercise of the court's discretion in any particular case necessarily involves the balancing of all the relevant factors on either side, those favouring the grant of a stay on the one hand, and those militating against it on the other."

11 Applying this approach, he concluded that while the defendant had adduced evidence to show that it would, in some respects, be more convenient and less expensive to have the proceedings relating to the collision determined in Germany where it occurred, it appeared to him that the evidence showed no more than a mere balance of convenience in favour of the continuance of the proceedings in Germany. He found that the defendant had not satisfied him that justice could be done between the parties in Germany at substantially less inconvenience or expense than in Gibraltar, and refused the stay on that ground alone.

12 He went on to say that, in any event, he found that a stay of the Gibraltar proceedings would deprive the plaintiffs of a legitimate juridical advantage which would be available to them here. This related to the limitation proceedings started by the defendant in Germany under the 1957 Brussels Convention. In these proceedings, it was said that the onus of proving whether the collision resulted from the actual fault or privity of the owners (a fact to be decided against the defendant if the limitation were to be broken) would be on the plaintiffs in Germany, but on the defendant in Gibraltar. But more importantly, the learned judge's view was that in proceedings to break the limitation in Germany, the plaintiffs would not have the same broad right to the discovery of documents that they would have in Gibraltar.

13 Having found that the plaintiffs would suffer a juridical disadvantage by having to litigate in Germany, he went on to consider whether this was a factor which outbalanced the factors relied upon as pointing to Germany as the natural and appropriate forum. He concluded: "I do not consider this factor [*i.e.* the juridical disadvantage factor], is outweighed by these, such as they are, pointing to the German court as the natural and appropriate forum for the adjudication of the proceedings between the parties."

The appellant's arguments

14 It was the general approach of the learned judge which Mr. Stone, for the defendant, attacked as being based upon a wrong principle. He contended that the proper approach was to be derived from the cases cited and the later case of *The Spiliada* (7). The approach was that in the circumstances of this case, the primary duty of the court was to determine, if it could, what the natural forum of the dispute was on the basis of with

which forum the action had the most real and substantial connection, taking into account, among other things, where the cause of action arose, the availability and convenience of the parties and witnesses and generally where justice might best be done. If, on balancing these factors, the natural forum was Germany, then the court should grant a stay of the Gibraltar action unless the plaintiffs could show objectively and by cogent evidence that there was some juridical advantage of which they would be deprived by having to conduct proceedings in Germany.

15 He contended that a proper application of this approach could only result in a finding that the natural forum of the dispute was Germany. He further contended that the matters relied on by the learned judge as being juridical disadvantages should not, on the authorities, have been relied upon, and that a stay should have been granted.

16 Mr. Stone accepted that his appeal was an appeal against the exercise of a juridical discretion and that it was necessary for success for him to show that the learned judge applied a wrong principle in reaching his conclusion. He did not contend that he took the wrong matters into account or omitted to consider matters which he should have considered nor that he was plainly wrong. In short, he accepted what Lord Brandon said in *The Abidin Daver* (1) ([1984] A.C. at 420). His case was that the learned judge adopted the wrong approach in principle on the first leg of the enquiry and on the second leg relied upon "juridical disadvantages" which, on the authorities, he should not have relied upon. To test whether the proper approach should be that as is submitted by Mr. Stone, it is necessary to consider the authorities.

The law applicable

17 Since the more recent cases both in the House of Lords and the Court of Appeal, notably, *The Spiliada* (7), *The Atlantic Star* (3), *Rockware Glass Ltd.* v. *Macshannon* (6) and *Muduroglu Ltd.* v. *T.C. Ziraat Bankasi* (5), the principles governing the law relating to the court's approach to problems of competing jurisdictions can now be said to have reached a degree of stability, if not finality. The general approach was enunciated by Lord Goff in *The Spiliada* (7). This decision was concerned with whether a case was a proper one for the granting of leave to serve process out of the jurisdiction of the English court under O.11, r.4(2) of the Rules of the Supreme Court. The case involved a claim for damage done to a Liberian registered and owned ship, by a cargo of wet sulphur loaded in it in Vancouver for carriage to India, consigned by a Canadian company. The only connection with England was that some part of the Greek management took place in England, but an important feature of the case was that a similar action had occupied the court for a considerable time (a feature referred to as the "*Cambridgeshire* factor").

18 The proper approach of the court, it was said by Lord Goff ([1987] A.C. at 476) was that—

> ". . . [A] stay will only be granted on the ground of *forum non conveniens* where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, *i.e.* in which the case may be tried more suitably for the interests of all parties and the ends of justice."

19 He went on to point out that in general, the burden of proof rested on the party seeking a stay, but, if the court was satisfied that there was another available forum for the trial of the action, the burden would then shift to the other party to show that there were special circumstances by reason of which justice required that the trial should nevertheless take place in England.

20 In the light of Lord Goff's further observations (*ibid.*, at 477–478), it may be that this understates the extent of the burden on the person seeking the stay. He said (*ibid.*, at 477) that ". . . the burden resting on the defendant is not just to show that England is not the natural and appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum."

21 He concluded ([1987] A.C. at 478):

> "If however the court concludes at that stage that there is some other available forum which *prima facie* is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this inquiry, the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions. One such factor can be the fact, if established objectively by cogent evidence, that the plaintiff will not obtain justice in the foreign jurisdiction . . . on this inquiry, the burden of proof shifts to the plaintiff."

22 In the course of the speeches in *The Spiliada* (7), reference was made to, among many others, *The Atlantic Star* (3), *The Abidin Daver* (1) and *Rockware Glass Ltd.* v. *Macshannon* (6). These cases, particularly the first two, are very much closer on the facts to the case we are now considering.

23 *The Atlantic Star* (3) concerned a collision in Belgian river waters, between a Dutch ship, a Dutch owned barge and a Belgian owned barge. The Belgian owner started proceedings for damages in Belgium, and the Dutch owner started proceedings in England, arresting the *Atlantic Star* in

Liverpool. An application by the *Atlantic Star* to stay the English proceedings was refused in the Admiralty Court and in the Court of Appeal, but allowed in the House of Lords by a majority. In this case, heard 13 years ago, somewhat more conservative or perhaps chauvinistic reasoning was adopted even by the majority allowing the appeal. But the considerations set out by Lord Wilberforce ([1974] A.C. at 463), which in many ways resemble the facts in the present appeal, led him to agree with Brandon, J., the judge of first instance, that the Belgian court was by far the more appropriate forum to try the claim. Lord Reid (*ibid.*, at 454) said:

> ". . . I would draw some distinction between a case where England is the natural forum for the plaintiff and a case where the plaintiff merely comes here to serve his own ends. In the former the plaintiff should not be 'driven from the judgment seat' without very good reason, but in the latter the plaintiff should, I think, be expected to offer some reasonable justification for his choice of forum if the defendant seeks a stay."

24 *The Abidin Daver* (1) concerned a collision in the Bosphorus between a Cuban and a Turkish ship. The Cuban ship was arrested in Turkish waters and proceedings for damages begun in a Turkish court. Three months later, the Cuban owners arrested a sister ship of the Turkish owners in England and started proceedings there. The House of Lords, on appeal, restored the stay of the English proceedings ordered at first instance. Lord Diplock said ([1984] A.C. at 411–412):

> "Where a suit about a particular subject matter between a plaintiff and a defendant is already pending in a foreign court which is a natural and appropriate forum for the resolution of the dispute between them, and the defendant in the foreign suit seeks to institute as plaintiff an action in England about the same matter to which the person who is plaintiff in the foreign suit is made defendant, then the additional inconvenience and expense which must result from allowing two sets of legal proceedings to be pursued concurrently in two different countries where the same facts will be in issue and the testimony of the same witnesses required, can only be justified if the would-be plaintiff can establish objectively by cogent evidence that there is some personal or juridical advantage that would be available to him and in the English action that is of such importance that it would cause injustice to him to deprive him of it."

25 He went on to agree very firmly with Lord Brandon's conclusions from the facts and to approve the finding of Sheen, J. (*ibid.*, at 412) that the facts "pointed ineluctably" to the Turkish forum as being the one in which the action could more conveniently be tried. Lord Keith (*ibid.*, at 415) used the term "natural forum" as being that with which the action

had "the most real and substantial connection," and did not hesitate in finding that the natural forum was the Turkish court.

26 *Rockware Glass Ltd.* v. *Macshannon* (6) was quite a different type of case concerning a dispute over where, between England and Scotland, an action for damages for industrial injuries should be tried. The plaintiffs, all Scotsmen, living and working in Scotland were suing for injuries sustained in Scotland, bringing action in England where the defendants had registered offices. The House of Lords allowed the appeal and ordered the stay sought by the defendants, on the basis that the only natural and appropriate forum was the Scottish court, and that this cast an onus on the plaintiffs to show some reasonable justification for the choice of an English court, *per* Lord Diplock ([1978] A.C. at 812). This is the only case to which we were referred where the basis of jurisdiction of the English court was the residence or registered office of the defendant.

27 I have referred to these earlier cases in some detail because, as I have said, they were all referred to in *The Spiliada* (7), but without any indication that any of them went too far in allowing the stays granted in them, or advanced too easy a burden for the person applying for the stay to discharge. *Muduroglu* v. *T.C. Ziraat Bunkasi* (5) was a commercial case and the facts are of no real moment. The headnote to the case in *The All England Law Reports*, which accurately reflects the judgment, reads ([1986] 3 All E.R. at 683):

> ". . . The court would primarily consider what was the natural forum of the dispute, taking into account such factors as where the cause of action arose, the law applicable, the availability of witnesses and any saving of costs. In the circumstances, the overwhelming connection between the dispute and Turkey meant that a stay of the English proceedings ought to be granted even though there would be relative inconvenience and possibly greater expense caused to the plaintiffs, since those factors were not of sufficient weight to justify refusing a stay . . ."

Leave to appeal was refused by the House of Lords.

28 If one thing is clear from this series of cases, it is that the English courts have come to regard as the natural forum for an action, the place with which it has the most real and substantial connection, and not to insist on maintaining English jurisdiction as they did previously. As Lord Diplock puts it in *The Abidin Daver* (1) ([1984] A.C. at 411), "judicial chauvinism has been replaced by judicial comity."

29 Even before the most recent case of *The Spiliada* (7), Sheen, J. in *The Coral Isis* (4) had adopted this approach. That case concerned a collision between two foreign ships in international waters off Denmark. The ships proceeded to different European ports where they were surveyed and

repaired. The owners of the *Coral Isis* arrested the *Celtic Sky* in Holland and commenced proceedings there. Thereafter, the owners of the *Celtic Sky* arrested the *Coral Isis* in England and commenced proceedings there. The defendants in the English court sought a stay of the English proceedings. It was on these facts that Sheen, J. set out the three principles upon which the learned judge below relied. But before he reached the stage of setting out these principles, Sheen, J. had already considered what he said was the first question to be decided, namely whether the Dutch court was a natural and appropriate forum. After referring to *Rockware Glass Ltd.* v. *Macshannon* (6) and commenting that of course, in that case, a court in Scotland was the natural forum ([1986] 1 Lloyd's Rep. at 416), he said:

> ". . . The same cannot be said of an action arising out of a collision in international waters between two ships of different nationalities. It must frequently happen that when such a collision has occurred no court can properly be described as 'the natural forum' or even 'a natural forum.' The reasons are self-evident."

30 He then found that both the English and the Dutch courts were equally appropriate forums, but that neither court could claim to be "a natural forum." It was only then that he went on to set out three principles already mentioned.

31 It will have been seen that many ways of formulating the proper tests have been adopted by those who have delivered the speeches and judgments. One must be very careful not to be carried away by the semantics and also to bear in mind that, as with all English cases, principles are expressed which arise from particular cases, and the precise wording must not be applied too slavishly on the facts.

32 A distinction may first be drawn between natural and appropriate forum. An appropriate forum is one in which a case may appropriately be tried—in this case either Germany by virtue of the service of the German process on the master of the *Brady Maria* or Gibraltar by virtue of the registration of the *Waylink* or the place of registration of the owning company. The natural forum is, to use Lord Keith's words in *The Abidin Daver* (1) ([1984] A.C. at 415), "that with which the action had the most real and substantial connection," a test he also propounded as early as 1978 in *Rockware Glass Ltd.* v. *Macshannon* (6). With this qualification, the now developed approach is that enunciated by Lord Diplock in *The Abidin Daver* ([1984] A.C. at 411–412) as set out above. There is nothing in *The Spiliada* (7) which requires any modification of this, and, of course, it must not be forgotten that in *The Spiliada* there was no question of the cause of action having arisen in England. It was essentially, if one may use that term, an expense and convenience case, decided primarily on what was referred to as "the *Cambridgeshire* factor."

33 On the authorities, as they are to be applied to the case now under consideration, the enquiry should fall into two stages on the lines contended for by Mr. Stone, namely, (1) the first enquiry should be to determine what forum was the natural and appropriate forum on the basis of with which forum the action had the most real and substantial connection. This enquiry should take into account, among other things, where the cause of action arose, the availability of witnesses and generally where justice might best be done; (2) if the result of the enquiry was that Germany was the natural forum, then the court should grant a stay of the Gibraltar action unless the plaintiffs could show objectively by cogent evidence that there was some juridical advantage of which they would be deprived by having to conduct proceedings in Germany.

Natural and appropriate forum

34 We were, in argument, taken very carefully through the judgment of the court below, and I must say that I am convinced by Mr. Stone's contention that the learned judge did misdirect himself. Having set out the many factors advanced by the parties, he applied the test enunciated by Sheen, J. in *The Coral Isis* (4) which was appropriate to a case where there was no natural forum without considering whether or not there was a natural forum. This is apparent from the passage where he says that a mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his claim in an English court if it is otherwise properly brought. He did not enter into the enquiry to which Sheen, J. ([1986] 1 Lloyd's Rep. at 415–416) referred as the first question to be decided, namely, whether the German court was a natural and appropriate forum. Such a question did not arise in *The Coral Isis* (4) as there was no particular connection between any country and the collision on the high seas. This wrong approach is in my view sufficient to allow the court to look at the issue which should have been decided and to make the necessary decision.

35 I have not overlooked Mr. Aikens's submission that the way the passage in the learned judge's reasons is expressed carries a necessary inference that he found that Germany was not the natural forum. I do not think that such an inference can be drawn from that passage. Nor do I think that the passage at the end of the reasoning, where, having considered the juridical disadvantage question, he says that he does not think that "this factor is outweighed by those, such as they are, pointing to the German court as the natural and appropriate forum." The very use of these words appears to be a reference back to the "mere balance of convenience" and to leave out the question of whether there is a real and substantial connection with Germany.

36 If I am right in thinking that this court must look afresh at this question, we must still do so accepting the learned judge's views as to the

factors relied upon. He found, as "potent factors" in favour of Germany, that the collision occurred in Germany and that a number of German witnesses could well be required; he found of some weight that surveys to both ships, and repairs to the *Brady Maria* were carried out in Germany, and of less weight that Germany was a regular port of call of the *Waylink*. He found all other factors neutral, but not one weighing against Germany as the natural and appropriate forum on the balance of convenience test. Nor did he find on this test any factor weighing in favour of Gibraltar, save of course for the registration of the ship and the registered domicile of the owner.

37 Applying the tests adopted since *The Atlantic Star* (3), it is difficult to find that there was any conclusion to be reached but that Germany was the place with which the action had the most real and substantial connection. Taking further into account that there was, as the learned judge found, a balance of convenience in favour of Germany, even though only a "mere balance," it must be said that the natural and appropriate forum for these proceedings was Germany.

38 This conclusion means that the court now has to go on to consider the learned judge's ruling on the aspect of juridical disadvantages. Again, on this aspect the law has followed a parallel development since *The Atlantic Star* (3).

Juridical disadvantage

39 To appreciate the issues on the aspect of juridical disadvantage, it is necessary to briefly examine the limitation of liability aspects of this dispute. Under the 1957 Convention, a ship owner may limit his liability arising from a collision to a sum related to the tonnage of his ship.

40 The procedures for doing this vary depending upon the Convention country in which the owner takes his limitation proceedings. In Germany the owner, as it did here, applies to a magistrates' court which determines the amount of the limitation fund and calls for the lodging of claims against that fund. Claimants may accept that they will only receive a proportion of their claim, rather as in bankruptcy proceedings, because of the limited size of the fund, or they may proceed in another court for their full claim. Whether they will succeed in "breaking the limitation" depends upon whether the occurrence giving rise to the claim resulted from the actual fault or privity of the owner. In Germany, the burden of establishing actual fault or privity of the owner is upon the claimant. In England (and Gibraltar), equivalent but slightly different procedures apply, but the burden of breaking the limitation lies upon the owner, who must establish that there was no actual fault or privity on his part.

41 Mr. Aikens put the plaintiffs' case on this aspect of the case on the basis that if the plaintiffs had to litigate in Germany on the issue of

breaking the limitation, not only would the onus be on them but they would not have the benefit of an English-type discovery procedure to enable them to seek out from the defendant information which might assist them in doing this, particularly documents which might show inadequate management, maintenance of the ship and instructions to and qualifications of the crew. It was clear on the affidavits that German law did not have a discovery procedure which compelled a party to disclose documents adverse to his case, and that accordingly the plaintiffs would be in a very much worse position to fight their case than they would be if the proceedings were conducted in Gibraltar. This is an attractive argument on the face of it, but it must be looked at in the light of the authorities.

42 He referred with approval to *Trendtex Trading Corp.* v. *Credit Suisse* (8), where the House of Lords stayed English proceedings in favour of Swiss proceedings even though this deprived a party of the advantage of the more extensive English procedure of discovery of documents in a case of fraud.

43 The courts clearly recognize now that in both shipping and commercial matters which have an international flavour, it requires very clear evidence to show that the procedures adopted in other civilized and sophisticated jurisdictions will cause injustice because they differ from English procedure. It may be that discovery procedures in civil law jurisdictions are limited, but this may be compensated for by the investigatory role of the trial judge. Such differences cannot be relied upon to establish that justice will not be done in the foreign jurisdiction without convincing evidence that injustice is likely to result.

44 As Lord Goff said in *The Spiliada* (7) ([1987] A.C. at 477), there must be cogent evidence that objectively a plaintiff will not obtain justice in the foreign jurisdiction before an otherwise natural and appropriate forum is preferred to the English forum where that is not the natural forum.

45 In my view the evidence does not go far enough to establish that the fact that the plaintiffs will be deprived of the advantages of Gibraltarian discovery procedure will cause them substantial injustice, even where as here there is an onus on them in Germany in any proceeding to break the limitation. It should be noted, with respect to the move away from the chauvinistic approach to the comity approach on the question of forum, that there has been a similar move in regard to the loss of juridical advantage.

46 In *Amin Rasheed Shipping Corp.* v. *Kuwait Ins. Co.* (2), where the issue was whether proceedings should be in England or Kuwait, Lord Diplock referred to the argument before the House that since Kuwait was one of those countries where courts adopt the practice and procedure that was followed in countries whose legal systems were derived from the civil

law and not from the English common law, the ability of a Kuwaiti court to decide disputed matters of fact, was markedly inferior to that of the Commercial Court in England. He said ([1984] A.C. at 67):

> ". . . [I]t would have been wholly wrong for an English court, with quite inadequate experience of how it works in practice in a particular country, to condemn as inferior to that of our own country a system of procedure for the trial of issues of fact that has long been adopted by a large number of both developed and developing countries in the modern world."

47 This view was strongly endorsed by Lord Diplock ([1984] A.C. at 410) and Lord Brandon at (*ibid*., at 424) in *The Abidin Daver* (1), Lord Diplock referring (*ibid*., at 406) to the fact that in the civil law system the judge plays a more active investigatory role than an English judge does under the English procedure. The significance of differences in regard to discovery was fully dealt with by Lord Goff in *The Spiliada* (7), where he contrasted both the American and civil law procedure with that of England. He said ([1987] A.C. at 482): "I cannot see that, objectively, injustice can be said to have been done if a party is, in effect, compelled to accept one of these well-recognised systems applicable in the appropriate forum overseas." In my view, he should not have found that the deprivation of the English discovery procedure was such a juridical disadvantage as to justify the refusal of the defendant's application for a stay.

Conclusion

48 Looking at the case as a whole, following the learned judge's incorrect approach to the principles to be applied, I am satisfied that the German court is an appropriate forum for the trial of the disputes and that it is the natural forum.

49 The collision was in a German river, when German pilots with local knowledge had charge of the navigation; both vessels were surveyed and one was repaired in Germany; a limitation fund under the 1957 Convention has been set up in Germany; German witnesses, both technical and perhaps lay, are likely to be required, with less disruption to them and their employers if the proceedings are in Germany. As against this, the connection with Gibraltar is the registration of the ship and the official but not practical domicile of the defendant. The balance is overwhelmingly in favour of Germany as the natural forum, where proceedings by the defendant have already been instituted in which the first plaintiff can counterclaim, and where a claim can be brought by the second plaintiff.

50 If anything need be added to this, it is that the learned trial judge found none of the other factors before him to be other than neutral or slightly in favour of the German forum. There was no sufficient evidence that by refusing a stay of the Gibraltar proceedings the plaintiffs would

suffer any juridical disadvantage justifying a finding that they would suffer any injustice from having to pursue their claim in Germany. In my view, the appeal should be allowed.

51 **LAW, J.A.:** The facts and the relevant law out of which this appeal arises are fully set out in the judgment of Fieldsend, J.A. above. The main issue on this appeal is whether Germany should be regarded as the natural and appropriate forum for the proceedings. If it should, the next question to be considered is, have the respondents shown that a stay would deprive them of a juridical advantage of sufficient importance to outweigh the continuance of the proceedings in Germany. On the main issue, the Chief Justice made no direct finding, but he did say that the respondents had adduced evidence from which it appeared to him that no more than a "mere balance of convenience" had been established in favour of the continuance of the proceedings in Germany, and he went on to hold that the fact that the respondents would have a right of discovery in Gibraltar, which they would not have in Germany, was a juridical advantage of sufficient importance to outweigh what he had described as the mere balance of convenience pointing in favour of the German forum. As he made no definite finding as to whether Germany was the natural and appropriate forum, we must examine that question ourselves. As to this, I agree with Fieldsend, J.A. that Germany is both an appropriate forum and the natural forum for the trial of the disputes between the parties, for the reasons given by him, namely that—

> "the collision was in a German river when German pilots with local knowledge had charge of the navigation; both vessels were surveyed and one repaired in Germany; a limitation fund under the 1957 Convention has been set up in Germany; German witnesses both technical and perhaps lay are likely to be required, with less disruption to them and their employers if the proceedings are in Germany. As against this the connection with Gibraltar is the registration of the ship and the official but not the practical domicile of the defendant. The balance is overwhelmingly in favour of Germany as the natural forum, where proceedings have already been instituted in which the first plaintiff can counterclaim, and where a claim can be brought by the second plaintiff."

52 I also agree with Mr. Stone's submission, that in these circumstances the natural and appropriate forum can only be Germany, being the place with which the action had the most real and substantial connections. As regards the juridical disadvantage, which the Chief Justice considered would be suffered by the respondents through being deprived of the benefit of Gibraltar's discovery procedure, I would repeat the words of Lord Diplock in *Amin Rasheed Shipping Corp.* v. *Kuwait Ins. Co.* (2), where he said ([1984] A.C. at 67):

> " . . . [I]t would have been wholly wrong for an English court, with quite inadequate experience of how it works in practice in a particular country, to condemn as inferior to that of our own country a system of procedure for the trial of issues of fact that has long been adopted by a large number of both developed and developing countries in the modern world."

53 Likewise, Lord Goff in *The Spiliada* (7) ([1987] A.C. at 483), said "I cannot see that objectively injustice can be said to have been done if a party is, in effect, compelled to accept one of these well-recognised systems applicable in the appropriate forum overseas." Also very much in point is the decision in the case of *Trendtex Trading Corp.* v. *Credit Suisse* (8), where the House of Lords stayed English proceedings in favour of Swiss proceedings although this deprived a party of the advantage of the more extensive English procedure in a case of fraud.

54 It thus appears to me that the learned Chief Justice erred in his approach to the question of what was the natural and appropriate forum, and in the weight which he attached to the juridical disadvantage which he considered that the respondents would suffer if a stay were ordered. I am of course aware that the Chief Justice's order represents an exercise of judicial discretion, with which an appellate court is loath to interfere unless it can be shown that the decision was wrong. With some hesitation, I have formed the view that this is a case in which this court should interfere on the basis that the Chief Justice's decision was wrong. He should, in my view, have held that Germany was the natural and appropriate forum in which the dispute could be tried more suitably in the interests of all the parties and the ends of justice, and he ought not to have held that the juridical consideration outweighed that factor. I would allow this appeal.

55 **SPRY, P.:** The facts out of which this appeal arises are set out in the judgment of Fieldsend, J.A., as is the relevant law, and I shall not repeat them. The main issue on the appeal is whether Germany should be regarded as the natural and appropriate forum for the proceedings between the parties.

56 The learned Chief Justice made no express finding on the question of an appropriate or natural forum. He based his decision on a finding that a stay of proceedings would deprive the respondents of a real juridical advantage, adding: "I do not consider that this factor is outweighed by those, such as they are, pointing to the German court as the natural and appropriate forum for the adjudication of the proceedings between the parties."

57 Mr. Aikens suggested that this amounted to a finding that Germany was a natural forum but, with respect, I do not think so. I do not think it is

anything more than a finding that there are factors that might be interpreted as indicating a natural forum.

58 The factors that the Chief Justice took into consideration were, first, that the collision took place in German territorial waters and that there are "a number of" German witnesses likely to be called at the trial, including particularly the two pilots. These were factors favouring hearing in Germany. On the other hand, he thought the language factor, as regards witnesses and documents, particularly the ships' logs, favoured an English-speaking forum, although he chose to treat this as a neutral factor. He examined some eight other factors that had been mentioned by counsel and found them to carry little, if any, weight. He concluded that while it would "in some respects" be more convenient and less expensive for the proceedings to be determined in Germany, it appeared to him that the evidence showed no more than a mere balance of convenience in favour of the continuance of the proceedings in Germany.

59 Finally, the Chief Justice found that the fact that the respondents would have a right of discovery in Gibraltar, but not in the German courts was a juridical advantage of sufficient importance to outweigh the balance of convenience that he had found. I think that the Chief Justice must be regarded as having misdirected himself in that he did not focus his attention on the question of a natural forum and make an express finding on it. I agree with Fieldsend, J.A., that we must now do so, and ask ourselves if there is any forum with which the cause of action has a real and substantial connection.

60 I would summarize the relevant factors as follows; the proceedings result from a collision between two ships, one, the *Waylink*, registered in Gibraltar and the other, the *Brady Maria*, in Panama. The collision occurred in German waters, in the River Elbe, where navigation is governed by local regulations.

61 The *Waylink* is owned by a company registered in Gibraltar. She is registered at Lloyds as being managed by another Gibraltarian company but it appears that the actual management is conducted by an Italian company based in Monaco. The *Brady Maria* is owned by a company registered in Liberia and managed by a company incorporated and carrying on business in England. Her navigational records are kept in English.

62 The crews of both ships were Yugoslavian. The master and the officer of the watch of the *Brady Maria* were Yugoslavian. The record does not show the nationality of the master of the *Waylink*, although I think it may be inferred that he was also Yugoslavian. Both the master and the officer of the watch on the *Brady Maria* speak English and no German. The lookout speaks a little English but no German. Both ships were carrying German pilots at the time of the collision. One of them is said to speak

good English. The cargo of oil carried by the *Brady Maria* belonged to a German company, the second respondent.

63 Immediately following the accident, surveys of both ships were carried out for the respondents in Germany; the *Waylink* was then surveyed in Spain. The *Brady Maria* was repaired in Germany, after being beached following the collision. The appellant has instituted limitation proceedings in the Hamburg District Court and established a limitation fund. This seems to me to be of very limited relevance, because it appears that proceedings for unlimited damages could not be taken in that court but would have to be in a superior court, whether in Germany or elsewhere, so that there is no question of consolidating actions.

64 There are three matters that I have not treated as relevant to the question of the natural forum. The first of these is the fact that the appellant has instituted proceedings for damages against the first respondent in the Regional Court of Hamburg. This is the basis of the application for a stay but it has nothing to do with the question of a natural forum: it was the appellant's forum of choice.

65 Secondly, the Waterways and Shipping Administration of the Federal Republic of Germany and the Coastal Lands have lodged a claim against the appellant, as the owner of the *Waylink*, for damage which resulted from oil spillage from the cargo carried in the *Brady Maria* and there may also be a claim by the International Oil Pollution Compensation Fund, which is based in London. I think that claims arising out of the spillage are irrelevant, because there has apparently been no claim against the owner of the *Brady Maria*, I do not overlook the fact that the owner of the *Brady Maria* is also said to have established a limitation fund but that appears to be a purely precautionary measure.

66 Thirdly, there was an official investigation (Seeamt Enquiry) into the cause of the collision, which was conducted in Hamburg in December 1986. This was pending when the Chief Justice made his order but he considered that it was a factor that would appear to have very little weight one way or the other. I think it had none, unless the proceedings could have been timed to coincide, when it would have been a minor matter of convenience. That does not now arise.

67 The circumstances of this case bear some resemblance to those of *The Coral Isis* (4), except that in that case the collision occurred in international waters. Sheen, J., distinguishing that case from *Rockware Glass Ltd.* v. *Macshannon* (6), remarked ([1986] 1 Lloyd's Rep. at 416):

> ". . . The same cannot be said of an action arising out of a collision in international waters between two ships of different nationality. It must frequently happen that when such a collision has occurred no Court can properly be described as 'the natural forum' or even 'a

> natural forum.' The reasons are self-evident. The two ships may be registered in different countries; their owners or managers may be companies incorporated in yet other countries; the master and crew may be nationals of still different countries . . ."

68 In the present case, the collision occurred in German waters, at a time when both ships were in charge of German pilots. Those facts obviously establish a link between the cause of action and the Federal Republic. I think, however, that Germany can only be regarded as a natural forum, not as the natural forum.

69 So far as Gibraltar is concerned, it is the "home forum" of the owners of the *Waylink*, the defendants in the action, as well as being the port of registry of the ship. It cannot be said that the connection of the defendant with Gibraltar is a "fragile" one, an expression used by Lord Goff in *The Spiliada* (7), even though there is evidence that the management of the ship is conducted elsewhere. I think that Gibraltar is also a natural forum.

70 That leads to the question whether one or other forum is the more appropriate. On this question, the learned Chief Justice said that while the respondent had—

> "adduced evidence to show that it would in some respects be more convenient and less expensive to have the proceedings relating to the collision . . . determined in Germany where it occurred, it appears to me that this evidence shows no more than 'a mere balance of convenience' in favour of the continuance of the proceedings in Germany."

I see no reason to disagree with that finding.

71 Before leaving this subject, I think I should comment on the potential witnesses. The statement in the affidavit supporting the application for a stay that "there are potentially a large number of German witnesses, including several pilots, V.H.F. Operators (the V.H.F. conversations having taken place in German), Radar Operators and Personnel involved in the oil pollution clean-up operation" seems to me so indefinite as to have little or no probative value. It is not stated that there is the intention of calling a single German witness, and this despite the fact that the appellant was the first to institute proceedings and should have some idea of the evidence on which it will rely. By contrast, in *The Coral Isis* (4), each side stated the number of witnesses it intended to call, their residences and the languages they spoke. There is no indication how evidence by persons who were engaged in cleaning up the oil pollution could have any relevance. The factors to be considered in deciding whether or not to grant a stay must be factors relevant to the proceedings between the parties. Disputes that may exist between one of the parties and some other person may make one forum more attractive to that party but may not, in my opinion, be invoked

to the prejudice of the other party. The respondents did state that they would be calling three Yugoslavian witnesses.

72 In *The Spiliada* (7), Lord Goff ([1987] A.C. at 477) said that it was for a defendant seeking a stay "to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum."

73 In the present case, the appellant showed that there was another available forum that was appropriate for the proceedings but I do not think the appellant discharged the onus of establishing that Germany was "clearly or distinctly" more appropriate or more suitable for the interests of all the parties and the ends of justice. I agree that there were mis-directions in the order of the learned Chief Justice, but I am not persuaded that his decision was wrong. I would dismiss the appeal.

Order

74 The order of the court is that the appeal is allowed, the order of the learned Chief Justice is set aside and there is substituted an order that the proceedings of the Supreme Court be stayed pending the determination of the proceedings instituted in the Regional Court of Hamburg by the appellant against the first respondent.

Appeal allowed.